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January 22, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: August 13, 2008

Case Number: TSO-0665

This Decision concerns the eligibility of XXXXX XXXXXX ("the Individual") for a DOE access authorization.¹ This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's access authorization should be restored. For the reasons detailed below, it is my decision that the Individual's access authorization should not be restored.

I. BACKGROUND

This administrative review proceeding began with the issuance of a notification letter by a Department of Energy (DOE) local security office (LSO), informing the Individual that information in the possession of the DOE created a substantial doubt pertaining to his eligibility for an access authorization.² See Notification Letter, June 5, 2008.

The Notification Letter cites as security concerns under 10 C.F.R. § 710.8(f) (Criterion F) the Individual's discrepant responses in three contexts: during a March 2003 personnel security interview (PSI), on a July 2007 Questionnaire for National Security Positions (QNSP), and during a January 2008 PSI regarding his history of illegal drug use.³ During a March 2003 PSI, the Individual stated that he first used marijuana in 1986 when he was 16 years old and last used it in 1992 after his discharge from the military. *Id.* When pressed by the interviewer, he also admitted that he may have used marijuana one time between 1992 and 2000. *Id.* The Individual also stated that he tried cocaine once when he was 15 or 16 years old. *Id.* On his July 2007 QNSP, the Individual indicated that he used marijuana 20 to 30 times between May 1986 and

¹ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

² Access authorization, also known as a security clearance, is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

³ Criterion F pertains to false statements or misrepresentations by an individual during the course of an official inquiry regarding the individual's eligibility for access authorization, including responses during personnel security interviews or on security questionnaires. Such statements raise serious doubts regarding the individual's honesty, reliability, and trustworthiness. See 10 C.F.R. § 710.8(f).

February 1992. *Id.* During the January 2008 PSI, the Individual stated he smoked marijuana “at least once or a couple of times” in 1995 or 1996, and that he used cocaine when he was 16 or 17 years old and again in 1992 or 1993 after his military discharge. *Id.* According to the Notification Letter, the Individual’s inconsistent responses during the two PSIs and on the QNSP indicate that he may have falsified or withheld information regarding his history of illegal drug use.

The Notification Letter also cites security concerns under 10 C.F.R. § 710.8(k) and (l) (Criteria K and L, respectively).⁴ Under Criterion K, the Notification Letter states that the Individual tested positive for cocaine on a random drug screening in December 2007. *Id.* According to the Notification Letter, the Individual alleged during the January 2008 PSI that, while he was out at a night club three days before the random drug test, someone put cocaine in his drink without his knowledge or consent. *Id.* The Notification Letter states that the positive drug test also raises concerns under Criterion L because it indicates that the Individual violated a Drug Certification form, signed in March 2003, in which he certified that he would abstain from any use of, or involvement with, illegal drugs in the future. *Id.*

Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. *See* Individual’s Letter, July 22, 2008. In his response to the Notification Letter, the Individual maintained that he did not knowingly or intentionally use any illegal drugs and that he tried to answer the questions during the PSIs and on the QNSP honestly. *Id.* At the hearing, the Individual presented his own testimony.⁵ Three friends also testified on his behalf. The DOE counsel did not present any witnesses.⁶

II. HEARING TESTIMONY

A. The Individual

The Individual testified that he is “not a drug user” but that he “could have been around the wrong people at the wrong time.” Hearing Transcript (“Tr.”) at 46. The Individual acknowledged that his statement during the March 2003 PSI that his last marijuana use was in 1992 was incorrect. Tr. at 51. However, he stated that he was “kind of nervous and confused.” Tr. at 54. The Individual admitted that he used marijuana at least once or twice between 1992 and 2000. Tr. at 56-57. He stated that during the March 2003 PSI, when he stated that he may have used marijuana during the time period, he did not want to give a definitive answer because his memory “was kind of real cloudy” Tr. at 56. The Individual discussed his past cocaine use. When asked whether he did, in fact, use cocaine in 1992 or 1993 after his military discharge, the Individual stated, “I would say yes ... I think I might have [used] it ... I might

⁴ Criterion K pertains to information indicating that an individual has “trafficked in, sold, transferred, possessed, used, or experimented with” illegal substances. 10 C.F.R. § 710.8(k). Criterion L concerns refer to conduct tending to show that the Individual is “not honest, reliable, or trustworthy, or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security.” 10 C.F.R. § 710.8(l).

⁵ The Individual also submitted the results from three drug tests, taken subsequent to the positive December 2007 random drug test. The three drug tests were taken in December 2007, February 2008, and November 2008, and were each negative for any illegal drug. Indiv. Exs. A, C.

⁶ The DOE presented eleven exhibits, including a copy of the July 2007 QNSP and the transcripts of the March 2003 and January 2008 PSIs. DOE Exs. 1-11.

have tried [it], but I wasn't a user." Tr. at 60. The Individual was asked to explain the discrepancy between the March 2003 PSI and the January 2008 PSI regarding his past cocaine use, but he was unable to explain the discrepancy. Tr. at 57-59. The Individual was also questioned regarding the discrepant statements pertaining to his past use of marijuana. He stated, "I tried to tell the truth [during the PSIs] ... but I guess a lot of things didn't really dawn on me" Tr. at 63. The Individual added that he did not intentionally try to withhold information about his history of illegal drug use. He stated, "it's my past ... it happened so long ago and stuff, I didn't really feel like it really made a big difference. I don't know why I would try to lie about it on purpose. I really wasn't trying to." Tr. at 64.

Regarding the positive drug test in December 2007, the Individual "was shocked" when he received the results. Tr. at 67. He believed someone had laced his drink with cocaine when he was at a nightclub with his girlfriend a few nights before the drug test. Tr. at 69. He stated that he later confirmed his theory by speaking to one of the other individual's present that night. Tr. at 70. According to the Individual, he and his girlfriend were seated together at a table while some acquaintances he knew from growing up in his neighborhood sat at a nearby table. Those acquaintances offered him a drink, which he accepted, but did not tell him the drink contained cocaine. Tr. at 72.

The Individual stated that at the time he knew two of those individuals had a history of involvement with drugs – he suspected that they may have been drug dealers – but he had no actual knowledge that they were presently involved with drugs. Tr. at 73. He further stated that he had used marijuana with these acquaintances when he was about 16 or 17 years old, and that one of those acquaintances may have been present when he used cocaine in 1992 after his military discharge. Tr. at 90, 93. The Individual admitted he was aware that those acquaintances had taken drugs in their drinks in the past, but he did not know it to be a regular practice. Tr. at 95-96. He stated that it never occurred to him that they may have laced his drink with cocaine. Tr. at 96.

The Individual recalled signing the Drug Certification form in March 2003 and that it pertained not only to drug use, but also to involvement with illegal drugs and association with individuals who use illegal drugs. Tr. at 82, 97. He stated that at the time he did not see a problem with sharing a drink with some acquaintances from his past. Tr. at 76. He did not believe it was a violation of the Drug Certification to share a drink with acquaintances he happened to run into at a nightclub, despite his knowledge that those acquaintances had a history of involvement with illegal drugs. Tr. at 98-101. The Individual admitted that, in retrospect, it was "poor judgment" to accept the drink from them, knowing their history. Tr. at 96.

The Individual stated that his last use of any illegal drug, other than the cocaine-laced drink in December 2007, occurred in 1995 or 1996 when he last smoked marijuana. Tr. at 92. His last knowing use of cocaine took place in 1992. *Id.* The Individual stated that he did not know why he used the cocaine in 1992, stating, "I guess I was just curious." Tr. at 94. The Individual stated that he has made "poor judgments" in the past, but that he has changed his lifestyle. And no longer frequents nightclubs. He stated, "I even stopped going to [those] type[s] of places ... because it kind of – it kind of just brought me back to reality. I started concentrating more on the things like church again, you know ... I don't even socialize with that type of crowd anymore." Tr. at 77-78.

B. The Individual's Friends

Three of the Individual's friends testified at the hearing. Friend 1 has known the Individual for "about ten years." Tr. at 12. He described the Individual as "very, very nice," and "a God-fearing person." Tr. at 14. Friend 1 and the Individual attend the same church and have interacted socially through church activities. Tr. at 15. He has never known the Individual to use any illegal drugs and has never interacted with the Individual under any circumstances where illegal drugs were present. Tr. at 17, 21. Friend 1 stated that he never suspected the Individual of using illegal drugs. Tr. at 21. He stated that the Individual told him about the failed drug test in December 2007, but did not discuss with him the details. Tr. at 18, 21.

Friend 2 is a friend of the Individual's mother and has known the Individual "basically all his life." Tr. at 24, 29. They are also former co-workers. Tr. at 24. She stated that she is familiar with his work performance and is unaware of the Individual having any work-related problems. Tr. at 25. Friend 2 described the Individual as "easy-going" and "a pleasant person to work with." Tr. at 26. She stated that the Individual never discussed with her his past history of illegal drug use. Tr. at 26. Friend 2 is not familiar with the details of the Individual's private life and does not know his friends or acquaintances. Tr. at 31. She stated that the Individual told her that there was an issue with his drug test, but she did not know the details. Tr. at 29.

Finally, Friend 3 also testified on the Individual's behalf. Friend 3 has known the Individual for over 20 years. Tr. at 37. He and the Individual are members of the same fraternity and see each other at fraternity meetings. Tr. at 37, 41. In the past, Friend 3 and the Individual socialized frequently, attending church events, picnics and other social gatherings. Tr. at 38. Friend 3 has never known the Individual to use any illegal drugs and the Individual never discussed with him his past history of illegal drug use. Tr. at 38-39. Friend 3 was not aware that the Individual failed a random drug test in December 2007. Tr. at 39.

III. STANDARD OF REVIEW

The regulations governing the Individual's eligibility for an access authorization are set forth in 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security clearance determinations should err, if they must, on the side of denials").

Under Part 710, the DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. Once a security concern is raised, the individual has the burden to bring forward sufficient evidence to resolve the concern.

In considering whether an individual has resolved a security concern, the Hearing Officer considers various factors, including the nature of the conduct at issue, the frequency or recency

of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). The decision concerning eligibility is a comprehensive, common-sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a). In order to reach a favorable decision, the Hearing Officer must find that “the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(a).

IV. ANALYSIS

A. Criterion F – Falsification

As stated above, Criterion F concerns involve deliberate false statements, misrepresentations or omissions by an individual during the course of an official inquiry regarding the individual’s eligibility for access authorization, including responses during personnel security interviews or on security questionnaires. Such false statements, misrepresentations or omissions raise serious doubts regarding the individual’s honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent that individual can be trusted again in the future. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House) (the Adjudicative Guidelines), Guideline E, ¶ 15; *see also, e.g., Personnel Security Hearing*, Case No. VSO-0013 (1995); *Personnel Security Hearing*, Case No. VSO-0281 (1999), *aff’d*, Case No. VSA-0281 (2000).

The Notification Letter cites the Individual’s discrepant responses during the March 2003 PSI, on the July 2007 QNSP, and during the January 2008 PSI, as a security concern under Criterion F. After considering the record in this case, I am unable to find that the Individual has mitigated the Criterion F concern. The Individual was unable to adequately explain the discrepancies in his statements regarding his past drug use. The only explanation he offered was that he was confused or could not remember the dates. However, this does not resolve the security concern.

During the PSIs and at the hearing, the Individual was evasive in answering questions regarding his history of drug use. For example, during the March 2003 PSI, when he was first asked if he had ever used cocaine, the Individual expressly denied ever using cocaine. Only when pressed by the interviewer did he admit to using cocaine when he was about 16 years old, and he omitted the information about the cocaine use in 1992. The Individual gave similarly vague answers about his last use of marijuana during the January 2008 PSI and at the hearing, saying he “may have” or “could have” used marijuana once or twice around 1995 or 1996. The Individual’s lack of candor raises serious concerns regarding his honesty and I find nothing in the record to resolve those concerns.

Our previous cases have stated that a subsequent pattern of responsible behavior is of vital importance to mitigating security concerns arising from irresponsible behavior. *See Personnel Security Hearing*, Case No. VSO-0499 (2002). In most cases in which Hearing Officers have concluded that doubts about an individual’s judgment and reliability raised by evidence of falsification have been resolved, a substantial period of time has passed since the falsification. In these cases, the time period has allowed individuals to establish a pattern of responsible

behavior. In those cases where an individual was unable to establish a sustained period of responsible behavior, Hearing Officers have generally determined that the individual was not eligible to hold an access authorization. *See Personnel Security Hearing*, Case No. VSO-0448 (2001) (11 months not sufficient to mitigate four year period of deception); *Personnel Security Hearing*, Case No. VSO-0327 (2000) (less than one year of truthfulness insufficient to overcome long history of misstating professional credentials).

In the present case, the Individual has not established a significant pattern of responsible behavior. He has given inconsistent statements concerning his past use of illegal drugs, and has presented no evidence to corroborate his statements. Therefore, based on the recency of the DOE's knowledge of the discrepancies and the short amount of time the Individual has had to demonstrate any subsequent pattern of responsible behavior, I cannot find that the security concerns associated with his incomplete or inconsistent statements have been mitigated. Accordingly, the security concerns set forth in the Notification Letter under Criterion F regarding the Individual's discrepant statements during the March 2003 PSI, the July 2007 QNSP, and the January 2008 PSI remain unresolved.

B. Criteria K – Illegal Drug Use

It is beyond dispute that use of illegal drugs raises security concerns under Criterion K. *See* Adjudicative Guidelines, Guideline H, ¶ 24 ("Use of an illegal drug ... can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations."); *see also Personnel Security Hearing*, Case No. VSO-0113 (1995) ("The drug user puts his own judgment above the requirements of the laws, by picking and choosing which laws he will obey or not obey. It is further the concern of the DOE that the drug abuser might pick and choose which DOE security regulations he will obey or not obey with respect to protection of classified information.").

In this case, the Individual has failed to mitigate the security concern raised by the fact that he tested positive for cocaine in a December 2007 random drug screening. The Individual maintains that he did not intentionally use cocaine, but rather unknowingly ingested the drug in a drink provided to him by some acquaintances at a nightclub.

Based on the record in this case, there is simply insufficient information to support the Individual's assertions on this issue and, therefore, mitigate the security concerns. As an initial matter, given the fact that the Individual used both marijuana and cocaine in the past, as well as the fact that he has made inconsistent statements to DOE regarding his past use of illegal drugs, I find the Individual's explanation for the positive result on the drug test to be less than credible. In addition, the Individual brought forward no witnesses who could corroborate his accounting of events that night at the club. Further, none of the witness testimony is sufficient to corroborate the Individual's statements regarding his history of drug use in general. In that regard, I found the Individual's witnesses to be either uninformed or unwilling to testify about his past. One of the Individual's witnesses in particular appeared to be carefully parsing his words so as not to disclose any information about the Individual, while the two other witnesses appeared to have no real knowledge of the Individual's life beyond generalities. Based on this, I must accord little weight to their testimony. Given these factors, there is simply insufficient information in the

record to resolve the security concerns raised by the Individual's history of illegal drug use. *See, e.g. Personnel Security Hearing*, Case No. VSO-0481 (2001).

C. Criterion L – Violation of Drug Certification Form

Criterion L concerns refer to conduct tending to show that the Individual was “not honest, reliable, or trustworthy, or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security.” 10 C.F.R. § 710.8(l). In this case, the Criterion L concerns stem primarily from the Individual's violation of the Drug Certification form he signed in March 2003. The signing of a Drug Certification form represents a personal commitment by an individual to DOE to refrain from the use of illegal drugs and reflects an understanding by the individual that, but for the employee's personal commitment to refrain from drug use in the future, his prior drug use would have precluded him from holding a clearance. *See Personnel Security Hearing*, Case No. TSO-0555 (2008). There is no question that a violation of a written commitment to DOE raises security concerns. *See* Adjudicative Guidelines, Guideline E, ¶¶ 15, 16(f).

In this case, as stated above, the Individual's statement that he did not knowingly violate the Drug Certification by taking cocaine, but rather was the victim of a drug-laced drink, is not credible and remains entirely uncorroborated by the evidence in the record. However, even if the Individual's account is true, it does not resolve the concern raised by his mere association with those acquaintances he knew to be involved with illegal drugs. The Individual's statements that he did not believe associating with them at the club that night was a problem, despite knowing their history of involvement with drugs, leads me to question whether the Individual does not understand the importance of adhering to commitment he made in signing the Drug Certification or simply chooses to disregard it when he finds it inconvenient to do so. Moreover, I find that the Individual's discrepant statements during the PSIs and on the July 2007 QNSP regarding his past drug use and the positive drug test result raise concerns about the Individual's general honesty, trustworthiness, and reliability apart from the more specific concern raised by the violation of the Drug Certification. I find no evidence in the record which resolves those concerns.

V. CONCLUSION

Upon consideration of the record in this case, I find that there was evidence that raised doubts regarding the Individual's eligibility for a security clearance under Criteria F, K and L. I also find that there is insufficient evidence in the record to fully resolve those doubts and, therefore, the security concerns have not been adequately mitigated. As a result, I cannot conclude that granting the Individual an access authorization “would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). Accordingly, I find that the Individual's suspended access authorization should not be restored.

Diane DeMoura
Hearing Officer

Office of Hearings and Appeals

Date: January 22, 2009